No. 20-482

In the Supreme Court of the United States

HERBERT H. SLATERY III, ET AL.,
Petitioners,

v.

ADAMS & BOYLE, P.C., ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONERS

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Respondents all but concede that the decision below should be vacated under *United States v. Munsingwear*, 340 U.S. 36 (1950). Respondents agree that their challenge to Executive Order 25 is now moot, and they acknowledge that this Court has in the past vacated decisions involving executive orders that expired prior to this Court's review. They offer only two arguments against vacatur. Both are meritless. Petitioners are equitably entitled to vacatur because they did not cause this case to become moot, let alone do so for the purpose of evading judicial review. And vacatur here will prevent the decision below from spawning untoward legal consequences by eliminating a precedent that could adversely affect Petitioners in ongoing litigation and chill the conduct of state officials. There is no reason for this Court to depart from its "established practice" of vacatur. *Id.* at 39. To the contrary, it is especially important for this Court to adhere to that practice in this case to "eliminate[] a judgment" that otherwise would have warranted this Court's plenary review. *Id.* at 40.

ARGUMENT

I. Petitioners Are Equitably Entitled to Vacatur.

Respondents do not dispute that their challenge to Executive Order 25 became moot when the order expired by its own terms on April 30, 2020. And they acknowledge that this Court "has in the past vacated as moot court of appeals decisions concerning executive orders that expired prior to review." Opp. 3, 11. They

nevertheless half-heartedly suggest that vacatur here is not warranted because Tennessee "'caused the mootness' through its own 'voluntary action,' by permitting EO-25 to expire." *Id.* at 9 (quoting *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 24 (1994)).

That argument is baseless. This Court very recently considered a request for vacatur in a case that became moot because an executive order "expired by its own terms." *Trump v. Int'l Refugee Assistance Project*, 138 S. Ct. 353, 353 (2017) (quoting *Burke v. Barnes*, 479 U.S. 361, 363 (1987)). And this Court "[f]ollowed [its] established practice" of vacatur, *id.*, without any suggestion that the "voluntary action" exception to the *Munsingwear* doctrine was implicated.

That is not surprising, because the expiration of an executive order by its own terms is nothing like the "voluntary action" that was at issue in *Bancorp*. In *Bancorp*, the party that sought vacatur had "voluntarily forfeited" its opportunity for further review by entering a settlement agreement that mooted the case after this Court had granted certiorari. 513 U.S. at 25. This Court explained that, by entering the settlement agreement, the party had "surrender[ed] [its] claim to the equitable remedy of vacatur." *Id.* The "judgment [was] not unreviewable, but simply unreviewed by [the party's] own choice." *Id.* Here, by contrast, the State vigorously pursued appellate review, including by filing an emergency petition for rehearing en banc just days before the executive order expired, and was prevented from obtaining complete review only because of the "happenstance" of the

expiration of Executive Order 25 by its inherent terms. *Munsingwear*, 340 U.S. at 40.[1]

Respondents seem to think that the State "voluntarily relinquished" its right to appeal—and therefore its entitlement to *Munsingwear* vacatur—by failing to arbitrarily and unnecessarily extend Executive Order 25 to prevent mootness. Opp. 2. But that view fundamentally misreads *Bancorp*. *Bancorp* involved voluntary action that itself led to mootness, not the failure to *prevent* mootness that would otherwise occur. Respondents' view is especially odd given their argument below that extending Executive Order 25 "past April 30" would have "turn[ed] a three-week postponement of procedural abortions into something more draconian." App. 13a. Surely the State cannot be deprived of the equitable remedy of vacatur for failing to commit what Respondents insisted would have been a graver constitutional violation.

Even if allowing Executive Order 25 to expire by its own terms amounted to "voluntary action," it is not the sort of voluntary action that would make vacatur inappropriate. This Court has clarified that, even

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[1] Respondents suggest that the petitioners in *Planned Parenthood Center for Choice v. Abbott*, No. 20-305 (U.S.), have a greater equitable entitlement to vacatur than the State does here because they purportedly "played no role in causing their appeal to become to moot." Opp. 9. To the contrary, the *Abbott* petitioners are far *less* entitled to vacatur because they failed to seek emergency relief from either the en banc Fifth Circuit or this Court when they had the opportunity to do so. *See* Brief in Opposition at 23-25, *Abbott*, No. 20-305 (U.S. Nov. 9, 2020).

when mootness is caused by a party's voluntary action, vacatur should still be granted if the action was unrelated to the litigation and not motivated by a desire to avoid further review. In *Alvarez v. Smith*, 558 U.S. 87 (2009), this Court held that a federal constitutional challenge to Illinois' forfeiture procedures was moot because the state-court forfeiture proceedings for all six plaintiffs had already terminated. *Id.* at 92-94. The "terminations . . . f[e]ll on the 'happenstance' side of the line," the Court explained, because "the individual cases proceeded through a different court system without any procedural link to the federal case." *Id.* at 95. Because the "presence of th[e] federal case" that was before this Court "played no role in causing the termination of th[e] state cases," *Alvarez* did not involve "the kind of 'voluntary forfeiture' of a legal remedy that led the Court in *Bancorp* to find that considerations of 'fairness' and 'equity' tilted against vacatur." *Id.* at 97 (alteration adopted).

So too here. The expiration of an executive order by its own terms plainly falls "on the happenstance side of the line." *Id.* at 95 (quotation marks omitted). The three-week duration of Executive Order 25 was established before this litigation began and was driven by the circumstances of the COVID-19 pandemic and other factors completely unrelated to this litigation. As was the case in *Alvarez*, neither this litigation nor "a desire to avoid review in this case" played any "role at all" in causing the expiration of the order. *Id.* at 97. Because there are no equitable considerations that counsel against vacatur, this Court should "follow [its] ordinary practice" when a case becomes moot on appeal

and vacate the decision below. *Id.*; *see also Int'l Refugee Assistance Project*, 138 S. Ct. at 353.

II. Vacatur Will Prevent the Decision Below from Spawning Legal Consequences.

Vacatur here would well serve the purposes of the *Munsingwear* doctrine. Contrary to Respondents' argument, the possibility that the decision below "could affect the litigation" of Respondents' ongoing challenge to Tennessee's abortion waiting-period law is not "speculative." Opp. 11. Only two months ago, the district court held that law unconstitutional and permanently enjoined the State from enforcing it. *See Adams & Boyle, P.C. v. Slatery*, --- F. Supp. 3d ---, No. 3:15-cv-00705, 2020 WL 6063778 (M.D. Tenn. Oct. 14, 2020), *appeal pending*, No. 20-6267 (6th Cir. docketed Nov. 6, 2020). The district court found the law unduly burdensome because it purportedly causes "significant[] delays" which can "cause patients to miss the short cutoff date for a medication abortion . . . , thereby requiring them to undergo a more invasive and undesirable surgical abortion." *Id.* at 61, 64. If that sounds familiar, it is because the decision below upheld the injunction prohibiting enforcement of Executive Order 25 for similar reasons. *See* App. 24a (reasoning that applications of the order that "would require [a patient] to undergo a more invasive and costlier procedure tha[n] she otherwise would have . . . constitute[d] 'beyond question, a plain, palpable invasion of rights secured by'" the

Constitution).[2] Vacatur would appropriately "clear[] the path" for litigation of these issues in the Sixth Circuit and prevent the State from being prejudiced by a decision that was not only "preliminary," *Alvarez*, 558 U.S. at 94 (quoting *Munsingwear*, 340 U.S. at 40), but also issued on a highly expedited basis.

In any event, the legal consequences of the decision below will extend beyond the waiting-period litigation. A "constitutional ruling" is nearly always a "legally consequential decision" for a State because state officials will have an incentive to conform their conduct and policies to the ruling, even if it is incorrect. *Camreta v. Greene*, 563 U.S. 692, 713 (2011) (explaining that a constitutional ruling in a qualified immunity case has a "significant future effect on the conduct of public officials . . . and the policies of the government units to which they belong"). In the event it becomes necessary for the Governor to issue a similar executive order in the future, his hands should not be tied by a decision that was unreviewable. Nor should the conduct of other state officials be chilled. Instead, the proper course is to "strip[] the decision below of its binding effect" through vacatur. *Camreta*, 563 U.S. at

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[2] Both the district court's decision invalidating the waiting-period law and the decision below enjoining enforcement of Executive Order 25 contravene this Court's precedents. *See, e.g.*, *Gonzales v. Carhart*, 550 U.S. 124, 167 (2007) (rejecting challenge to a law prohibiting a particular method of abortion where "other abortion procedures that are considered to be safe alternatives" remained available); *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 885-86 (1992) (joint opinion of O'Connor, Kennedy, and Souter, JJ.) (rejecting challenge to 24-hour waiting period that "often" caused delays of "much more than a day").

713 (quoting *Deakins v. Monaghan*, 484 U.S. 193, 200 (1988)).

III. Plenary Review Would Be Warranted If This Case Were Not Moot.

Respondents find it "[n]otabl[e]" that "the State does *not* request that this Court grant plenary review to consider the constitutional questions on the merits." Opp. 2. But, of course, the only reason the State does not request plenary review is that the parties agree this case became moot when Executive Order 25 expired. As the State explained in the petition, if this case were not moot, it would warrant plenary review because the decision below directly conflicts with decisions of other Courts of Appeals and is erroneous under this Court's precedents. Pet. 13-25.

Respondents do not dispute that the decision below created a circuit conflict. *See* Opp. 2 (acknowledging that the Fifth Circuit "twice issued writs of mandamus keeping a Texas executive order analogous to EO-25 in place in full or in part"). And their only attempt to defend the decision's validity is to argue that it is consistent with *Roman Catholic Diocese of Brooklyn v. Cuomo*, No. 20A87, slip. op. (Nov. 25, 2020) (per curiam). Opp. 9-10 n.3. But *Roman Catholic Diocese*, which concerned a First Amendment challenge to occupancy limits that "single[d] out houses of worship for especially harsh treatment," No. 20A87, slip op. 3, provides no support for the decision below. The Sixth Circuit's conclusion that Executive Order 25 unduly burdened the abortion rights of Respondents' patients was wrong principally because it *expanded* the constitutional right to pre-viability abortion in a

manner contrary to this Court's precedents. *See* Pet. 19-22. While it may well be that "the Constitution cannot be put away and forgotten" during a pandemic, *Roman Catholic Diocese*, No. 20A87, slip op. 5, that principle is of no help to Respondents because the Constitution does not entitle a woman "to terminate her pregnancy at whatever time" and in "whatever way . . . she alone chooses." *Roe v. Wade*, 410 U.S. 113, 153 (1973). The Sixth Circuit's unreviewable holding to the contrary should be vacated.

CONCLUSION

This Court should grant the petition, vacate the judgment of the court of appeals, and remand the case to the court of appeals with instructions to remand to the district court for dismissal of all claims related to Executive Order 25.

Respectfully submitted,

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